No. 89-1612

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In The

Supreme Court of the United States

October Term, 1989

DARIUS IRBY, *et al.*,

Petitioners,

v.

VIRGINIA STATE BOARD OF ELECTIONS,

Respondents.

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a state mandated system of appointing local school board members violates the Equal Protection Clause where that system presently serves legitimate governmental purposes and has no disparate impact on minorities.

2. Whether the maintenance of an appointive system of local school board members violates § 2 of the Voting Rights Act where state law has never permitted election of school board members in the defendant jurisdictions and where there is no evidence to suggest that selection by popular election would increase minority membership on school boards.

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STATEMENT OF THE CASE

The individual petitioners herein are black Virginia citizens who reside either in the counties of Nottoway, Prince Edward, Buckingham or Halifax, or in the City of Petersburg. The organizational plaintiffs are Citizens for a Better America and the Virginia Unit of the Southern Christian Leadership Conference, both of which assert that their members (who are mostly black) are aggrieved by the Virginia system of appointing local school boards.

Respondents are those Virginia officials responsible for the selection of school board members in their respective jurisdictions – members of the School Board Selection Commissions of Nottoway and Buckingham Counties, members of the Boards of Supervisors of Prince Edward and Halifax Counties, members of the City Council of Petersburg, and members of the Electoral Boards of each of the named jurisdictions, as well as Susan H. Fitz-Hugh, Secretary of the State Board of Elections.

Petitioners alleged in their suit that Virginia's unique statewide system of appointing, rather than electing, school board members violates their rights under the First, Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution and under § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.

The origin of the Virginia system of appointing school board members dates back to 1870 when the Virginia General Assembly enacted the Public Free School Law, which provided for the appointment of school trustees by the State Board of Election (App. 111).[1]

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[1] References to the Petitioners' Appendix will be made as "(App. ___)."

As the trial court found, there is no evidence to suggest that the original decision to appoint rather than to elect school boards was racially motivated. That choice was made during the Reconstruction Era; not until 1874 were there concerted efforts in Virginia to exclude blacks from participation in the political process (App. 112).

By the time of the 1901-1902 Virginia Constitutional Convention, the tradition of appointing school boards state-wide was well established. At that Convention, a proposal was made to change to an elective system, but it was rejected to prevent poor whites and blacks from participating in the selection process (App. 116).

In 1947, the Virginia General Assembly permitted Arlington County to elect its school board – the only exception to the mandated appointive system ever approved. That exception was eliminated in 1956 during the state's program of massive resistance to school desegregation to punish Arlington County's school board for agreeing to school desegregation (App. 119).

In 1971, Virginia adopted a new Constitution which retained the appointive system. As petitioners concede, one of the purposes of the constitutional revision was to "close the door on the era of massive resistance to school integration" (App. 9). The trial court found no evidence that the decision to retain the appointive method of school board selection in the 1971 Constitution was tainted by racial considerations (App. 123).

Moreover, in 1984 the Virginia General Assembly commissioned a study to evaluate the merits of the existing appointive system as compared to an elective system. That study concluded that there were legitimate, non-

racial reasons for maintaining an appointive system (App. 126).[2] Furthermore, there is no evidence in the record to suggest that the consistent rejection of legislation to permit popular election of school boards since 1971 was tainted by considerations of race.

Black membership on Virginia school boards has steadily increased since 1970, when there were few black members. In 1975, blacks comprised 12 percent of all school board members statewide. That percentage rose to 15.9 in 1985 and to 18 in 1987 (App. 127), the latter percentage being the same as that of blacks of voting age in Virginia at the time of trial (*Id.*). During the 1980's, the General Assembly modified the appointive system by increasing public participation in the process (App. 124-25).

Both lower courts found petitioners' claims to be meritless. The trial court's ruling followed a bench trial and is supported by extensive findings of fact and conclusions of law (App. 104-153). The appellate court unanimously affirmed the trial court in all respects. A petition for rehearing and suggestion for rehearing *in banc* were denied.

SUMMARY OF ARGUMENT

This petition is without merit in large part because it is based primarily upon the false premises that

[2] Such as encouraging the participation of qualified citizens who would not participate in a political campaign, enhancing experience and continuity on school boards, etc. (App. 10-11).

petitioners proved that the Virginia appointive system for school boards was adopted and is currently maintained for racially discriminatory reasons. The lower courts held that the origin of appointed school boards in Virginia was not tainted by racial considerations. While there was evidence from the 1901-02 Constitutional Convention that the system was then continued, in part, as a means of keeping blacks out of the political process, Virginia is no longer operating under the 1901-02 Constitution and respondents proved that the system is currently maintained for legitimate, non-racial reasons.

To establish a violation of the Equal Protection Clause, petitioners had the burden of proving that the appointive system is maintained for discriminatory purposes *and* has a disparate impact upon black citizens. Petitioners proved neither, requiring the dismissal of their complaint after a full trial.

In addition, Virginia's choice of an appointive system over an elective system does not implicate § 2 of the Voting Rights Act. The Act does not apply to appointive offices and none of the defendant jurisdictions has ever permitted popular election of school board members. Furthermore, regardless of the applicability of the Voting Rights Act, petitioners failed to prove that the appointive system has a statewide disparate impact on black citizens, that it has a statistically significant impact on black citizens in the individual defendant jurisdictions, or that the implementation of a popularly elected system would increase black membership on school boards.

ARGUMENT

I. The Virginia Appointive System for Local School Board Members Does Not Violate the Constitution

A. The System Originated and is Currently Maintained for Legitimate Reasons Unrelated to Racial Considerations

Much of petitioners' brief is based upon the false premise that the Virginia system of appointing school boards was adopted and is currently maintained for racially discriminatory reasons. The lower courts rejected these contentions.

The Virginia tradition of appointing, rather than electing, school boards dates to 1870 during the Reconstruction Era, prior to systematic attempts to exclude black citizens from the political process. While the 1901-1902 Constitutional Convention rejected a proposal to elect school boards, that decision represented an effort to exclude *both* poor whites and blacks (App. 116).

Despite the racial taint of the decision to reject popular elections of school boards in the 1901-1902 Constitutional Convention and the legislative withdrawal of enabling legislation allowing for popular election of school boards in Arlington County, at least after 1971 the appointive system was continued for legitimate, nonracial reasons. This was the trial court's explicit ruling (App. 145), which was specifically considered and affirmed by the appellate court (App. 17-18). Furthermore, the trial court found that "[t]here is no evidence, direct or circumstantial, that the original decision to make school boards appointive rather than elective was motivated by racial discrimination" (App. 112). Yet petitioners argue

that the lower courts found that the appointive system was "adopted for invidiously discriminatory reasons" (Petitioners' Brief at 23).

Petitioners' error in asserting that the record shows that the appointive system was adopted to discriminate against blacks is compounded by their misinterpretation of the lower courts' opinions. They argue that because they have shown that the appointive system was tainted by improper racial considerations, the burden of proof (for purposes of Equal Protection analysis[3]) shifts to respondents to prove by a preponderance of the evidence that the system would have been adopted in the absence of racial considerations (Petitioners' Brief at 25), citing *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977).[4] Petitioners erroneously assert that the lower courts failed to engage in that burden-shifting for purposes of analyzing the constitutional challenge.

The burden of proof did not shift to respondents under *Mt. Healthy* because petitioners did not meet their

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[3] Petitioners have apparently abandoned their First Amendment theory, which was rejected by the trial court prior to trial in granting partial summary judgment to defendants (App. 54-55).

[4] Plaintiffs frequently cite *Mt. Healthy City School District v. Doyle*, 429 U.S 274 (1977), as stating the appropriate equal protection analysis. *Mt. Healthy* properly states the equal protection analysis with respect to a *contemporaneous employment* decision that may have been improperly motivated. The facts of *Mt. Healthy* are significantly different from the challenged system in this case where the challenge is based upon a *noncontemporaneous* incident involving improper purpose and where there is no evidence that the system is currently being maintained for any improper purpose.

initial burden of proving that the appointive system was conceived and maintained for purposes of limiting black participation. Nevertheless, giving petitioners the benefit of any doubt whether they had cleared this initial hurdle, the trial court further found that *even if* the burden of proof had shifted to respondents, they produced evidence to satisfy that burden:

> The state has carried its burden of proof in demonstrating that at least since 1971, the system has not been maintained for racially discriminatory reasons. The Constitutional Revision Commission addressed directly the policies of massive resistance and purged them from the educational system. Article VII of the [1971 Virginia] Constitution affirms this commitment. The 1984 legislative study also presents legitimate non-discriminating reasons for preserving appointive boards.

(App. 145). On appeal, the Fourth Circuit similarly held that it was unnecessary to decide whether petitioners are correct in their analysis of burden-shifting for purposes of evaluating their constitutional claims, because respondents successfully met any such burden. Concurring with the trial court's view of the evidence, the appellate court agreed that respondents "proved that racial discrimination no longer motivates Virginia's decision to retain an appointive system for selecting school board members" (App. 14).

B. Petitioners' Equal Protection Analysis is Flawed

Petitioners not only overlook the fact that the lower courts rejected their constitutional claims using

petitioners' burden-shifting analysis, but also ignore the requirement that they must prove *both* discriminatory intent and disparate impact to prove an Equal Protection violation. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239 (1976). Instead, petitioners assume that the racial taint in the continuation of the appointive system in 1902 renders the system "unenforceable" (Petitioners' Brief at 21). There is no basis in law or logic for that argument.

The Supreme Court in *Hunter v. Underwood* unequivocally held that a present-day discriminatory impact is necessary to establish an Equal Protection violation. In *Hunter*, the Court found that a state constitutional provision disenfranchising persons convicted of certain crimes violated the Equal Protection Clause because of the historical discriminatory purpose underlying its enactment *and* its present-day discriminatory impact on blacks. In its opinion, the Court stated as follows:

> Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and *the section continues to this day to have that effect*. As such, it violates equal protection under *Arlington Heights*.

471 U.S. at 233 (emphasis added). *See also Keyes v. School District No. 1*, 413 U.S. 189, 211 (1973).

Applying the appropriate Equal Protection analysis, the trial court herein found that "the plaintiffs have failed

to prove that the appointive system has adversely affected black participation on either a statewide or local basis in the named defendant localities" (App. 145-146). The constitutional analysis in this case properly ends with this finding of no discriminatory impact.

II. Virginia's Appointive System Does Not Violate § 2 of the Voting Rights Act

A. The Voting Rights Act is Inapplicable to the Appointment of Public Officials

The lower courts found it unnecessary to rule upon the applicability of the Voting Rights Act ("the Act") to appointive offices because they found petitioners failed to show a violation of the Act even if it were applicable. Nevertheless, both the trial court and the appellate court expressed doubt about the applicability of the Act to appointive offices. Section 2 of the Act, by its terms, applies only to the process of *electing* public officials. Where, as under the Virginia system of selecting local school board members, *no* citizens are permitted to vote, the Act is inapplicable. Neither the Commonwealth of Virginia as a whole nor any of the defendant jurisdictions has ever had the authority to elect school board members. Only one jurisdiction, Arlington County, has ever had authority to elect school board members and that jurisdiction is not a party to the present suit.

Those courts which have considered whether the Act applies to appointive offices have ruled it inapplicable. *Searcy v. Williams*, 656 F.2d 1003, 1010 (5th Cir. Unit B 1981), *aff'd sub. nom. Hightower v. Searcy*, 455 U.S. 984 (1982) (the Act does not apply to a system of appointive

school boards even if the system operates to exclude blacks). *See also Dillard v. Crenshaw County*, 831 F.2d 246, 251 n.12 (11th Cir. 1987) (Act is inapplicable to appointment of state judges).

The Fourth Circuit's opinion states that "it appears more probable than not that Section 2 is not applicable to appointive offices" (App. 22-23). This dictum is correct and the lower courts could have based their rulings on the petitioners' challenge under the Act on this principle of law. Instead, the lower courts chose to presume the Act's applicability, again giving petitioners the benefit of any doubt.

B. The Virginia System of Appointing School Board Members Does Not Have a Disparate Impact Upon Black Citizens

On a statewide basis, the Virginia system of appointing school board members does not operate to exclude blacks. The percentage of black membership on school boards is the same as that of the black voting age population in the state – 18 percent (App. 26-27). There is no evidence in the record to suggest that an elective system would result in more black school board members.

Of the five individual defendant jurisdictions, the lower courts found that there was no statistically significant disparity between the percentage of blacks in the population and on school boards in Nottoway County, Prince Edward County and the City of Petersburg (App. 28-29 and 149-150). For the two remaining jurisdictions,

the courts found the apparent disparity to be unrelated to the maintenance of the appointive system.[5]

C. Petitioners Failed to Establish the Existence of an Effective Remedy as Required to State a Claim Under the Voting Rights Act

Assuming that petitioners could convince the Court that the Act is applicable to an appointive system, on this record petitioners have failed to show that there is a remedy for the alleged exclusion of blacks from meaningful participation on Virginia's school boards. Petitioners must show that a remedy is available to make a *prima facie* case for relief under the Act. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

The only remedy offered by petitioners is that the federal courts set aside Virginia's appointive system and require implementation of an elective system in all local jurisdictions. Yet they presented *no* evidence that this switch would result in greater opportunities for black participation. The only relevant evidence suggests that if Virginia were to switch to elected school boards, the reasonably foreseeable result would be *fewer* blacks participating directly in school governance. Furthermore, petitioners did not allege or demonstrate that there exist

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[5] It was stipulated at trial that in Buckingham County, *every* black who had requested appointment to the school board had been appointed (App. 149). In Halifax County, the reasons for the failure to appoint blacks in numbers reflecting their representation in the population were found to be unrelated to the operation of the appointive system (*Id.*).

sufficiently large and geographically compact minorities in each jurisdiction to make majorities in single-member election districts or that there are politically cohesive minorities in each jurisdiction. *See Gingles*, 478 U.S. at 50-51.[6] Accordingly, petitioners failed to establish a *prima facie* case under § 2 of the Act, even assuming its applicability to this case.

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[6] To the contrary, the trial record demonstrates that Virginia blacks are split in their views on the merits of the appointive system.

CONCLUSION

This petition for certiorari should not be granted because it raises no issue of constitutional significance warranting review by this Court. Applying well established principles of constitutional and statutory law, the lower courts ruled petitioners' complaint meritless as a matter of fact and law. Petitioners have distorted the record and ignored the sound precedent and analysis set forth in both opinions below in their attempt to obtain review. Their petition should be denied forthwith.

Respectfully submitted,

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